

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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|---|---|---------------------|
| In the Matter of |) | |
| |) | |
| Connect America Fund |) | WC Docket No. 10-90 |
| |) | |
| Developing a Unified Intercarrier Compensation Regime |) | CC Docket No. 01-92 |
| |) | |

**FAIRPOINT COMMUNICATIONS, INC. PETITION FOR LIMITED WAIVER
OF SECTION 51.317(b)(7) OF THE COMMISSION’S RULES**

Pursuant to Section 1.3 of the Commission’s rules,¹ FairPoint Communications, Inc. (“FairPoint”) hereby requests a limited waiver of Section 51.317(b)(7) of the Commission’s rules in order to include in FairPoint’s Base Period Recovery (“BPR”) calculations certain funds the company has been unable to collect from Halo Wireless, Inc. (“Halo”) due to an access charge avoidance scheme perpetrated by Halo, and Halo’s subsequent bankruptcy and liquidation.² Consistent with Commission precedent granting similar relief to other incumbent local exchange carriers (“ILECs”) defrauded by Halo,³ FairPoint seeks to include in its BPR calculations \$124,531.06 in revenues associated with intrastate access traffic terminated to Halo during Fiscal Year 2011,⁴ and otherwise eligible for compensation under the FCC’s rules and the *ICC/USF Transformation*

¹ 47 C.F.R. §1.3.

² 47 C.F.R. §51.917(b)(7).

³ *Connect America Fund; Developing a Unified Intercarrier Compensation Regime; Petitions for Waiver of Section 51.917(b)(7) of the Commission’s Rules*, WC Docket No. 10-90, CC Docket No. 01-92, Order, FCC 14-121 (rel. Aug. 7, 2014) (the “*TDS Waiver Order*”).

⁴ The term Fiscal Year 2011 (or “FY 2011”) denotes the period from October 1, 2010 to and including September 30, 2011. See 47 C.F.R. 61.903(e).

*Order.*⁵ The requested waiver is supported by due cause and will serve the public interest. Prompt action on this petition is requested.

BACKGROUND

FairPoint is a midsize company uniquely comprising four different types of incumbent local exchange carriers (“ILECs”) for purposes of interstate rate regulation. The operations that FairPoint acquired from a Bell Operating Company (“BOC”) in Northern New England (Maine, New Hampshire and Vermont) are regulated by the FCC as mandatory price cap operations. FairPoint’s non-BOC ILECs in Northern New England are permissive price cap carriers⁶ with the exception of Community Service Telephone Company, which is a rural ROR company settling on an average schedule basis. Outside of Northern New England, FairPoint’s ILECs all are non-BOC, rural ROR ILECs. Most of the FairPoint ROR ILECs settle on a cost basis and participate in the National Exchange Carrier Association (“NECA”) traffic-sensitive pool.⁷ The remaining ROR ILECs settle on an average schedule basis, also through NECA.

⁵ *Connect America Fund et al.*, WC Docket No. 10-90 *et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 (2011), *review denied sub nom. In re: FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014).

⁶ Pursuant to FCC consent, FairPoint converted these study areas from cost-based rate-of-return (“ROR”) to price cap operations. See *Petition of Virgin Islands Telephone Corporation, for Election of Price Cap Regulation and Limited Waiver of Pricing and Universal Service Rules*; *China Telephone Company, FairPoint Vermont, Inc., Maine Telephone Company, Northland Telephone Company of Maine, Inc., Sidney Telephone Company, and Standish Telephone Company Petition for Conversion to Price Cap Regulation and for Limited Waiver Relief*; *Windstream Petition for Limited Waiver Relief*, Order, 25 FCC Rcd 4824 (2010).

⁷ FairPoint petitioned the Commission more than two years ago to convert the remainder of its cost-based ROR carriers to price cap regulation. That petition remains pending. See *Wireline Competition Bureau Seeks Comment on the Petition of the FairPoint Cost Companies for Conversion of Their Special Access Services to Price Cap Regulation and*

Under the Commission's *USF/ICC Transformation Order*, all of FairPoint's ILECs are treated as price cap carriers for CAF purposes, but FairPoint's ROR ILECs remain subject to the inter-carrier compensation rules, including the transitional access pricing rules, that generally govern ROR carriers, rather than the price cap ICC transition.⁸ Thus, FairPoint's ROR ILECs are in the midst of the transition to the bill-and-keep default methodology mandated for most inter-carrier compensation, and their revenue recovery during this transition period is based in significant measure upon the BPR calculated in accordance with the Commission's rules.⁹ The amount a rate-of-return LEC is entitled to recover in each year of the transition is determined by starting with the BPR and making required adjustments to produce the "Eligible Recovery" that may be recouped through a combination of the end-user Access Recovery Charge ("ARC") and federal Connect America Fund Intercarrier Compensation ("CAF ICC") support.¹⁰

The scope of this waiver request covers four FairPoint ROR ILECs operating in four different states that provided intrastate access service to Halo between October 2010 and August 2011 but were unable to collect due to an access charge avoidance scheme perpetrated by Halo, and Halo's subsequent bankruptcy and liquidation. The companies (and the states where they operate) are: Chouteau Tel (Oklahoma), FairPoint of Missouri (Missouri), GTC, Inc. (Florida), and Orwell Tel (Ohio).

for Limited Waiver Relief, Public Notice, WC Docket No. 12-71, DA 12-525 (rel. April 2, 2012).

⁸ See *USF/ICC Transformation Order*, 26 FCC Rcd 17663 (2011), ¶129.

⁹ See 47 C.F.R. §51.917.

¹⁰ *TDS Waiver Order*, ¶6, citing *USF/ICC Transformation Order*, ¶896.

REQUEST FOR LIMITED WAIVER

FairPoint seeks to include in its BPR calculations \$124,531.06 in revenues associated with the intrastate access traffic these companies terminated for Halo during Fiscal Year 2011, for which Halo did not pay FairPoint.¹¹ Although the charges in question were properly imposed on Halo's intrastate access traffic, and FairPoint in fact terminated all of the intrastate traffic sent to it by Halo during FY 2011, Halo attempted to avoid these charges by asserting after the fact that the traffic was intra-MTA CMRS traffic subject not to access charges but to reciprocal compensation.¹² Halo is an intermediate CMRS carrier, and did not carry originating CMRS traffic from its own end-users.

The Commission rejected Halo's construct in November 2011, finding that intra-MTA CMRS traffic terminated to a LEC is subject to reciprocal compensation only if the party initiating the call did so through a CMRS carrier.¹³ Halo, as an intermediate CMRS carrier, could not transform wireline-originated interexchange traffic subject to access charges into local traffic subject to the reciprocal compensation rule.

By the time of the FCC's ruling, Halo had amassed \$124,531.06 in ILEC access charges from FairPoint companies for FY 2011. FairPoint's bills for the traffic in question were issued in FY 2011.¹⁴ However, FairPoint has not collected any amounts from Halo on any of these bills.¹⁵ On or about August 8, 2011, Halo sought protection

¹¹ Declaration of Michael T. Skrivan, Attachment A, ¶1.

¹² Skrivan Declaration ¶¶1, 4. *See generally* 47 C.F.R. §51.701(b).

¹³ *ICC/USF Transformation Order*, ¶1006.

¹⁴ Skrivan Declaration ¶¶1, 3.

¹⁵ Skrivan Declaration at ¶¶1, 4.

from its creditors in a U.S. bankruptcy court in Texas. Accordingly, FairPoint submitted to the bankruptcy court its claim for the entire amount owed by Halo,¹⁶ but the company has yet to receive payment for any of the delinquent billings. On July 19, 2012 Halo filed for liquidation pursuant to Chapter 7 of the U.S. bankruptcy code. As the Commission has observed, as a result of Halo's bankruptcy protection, it is unlikely that ILECs such as the affected FairPoint companies ever will be able to recover these revenues.¹⁷

The Commission may waive any of its rules for good cause where, due to special circumstances, deviation from a rule would better serve the public interest and the Commission's purposes than strict enforcement of the rule.¹⁸ In considering the merits of a waiver, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.¹⁹

In the current instance, good cause exists to waive the rule and permit FairPoint to include the unrecovered billings in its BPR. The traffic in question was properly terminated and billed in FY 2011. FairPoint timely filed its proof of claim in the Halo bankruptcy proceeding, seeking compensation for the intrastate access traffic FairPoint

¹⁶ See Skrivan Declaration, ¶¶6-7; see also Attachment B, Letter from Susan L. Sowell, Vice President and Assistant General Counsel, FairPoint Communications, to the Clerk of the U.S. Bankruptcy Court, E.D. Texas (Nov. 7, 2011) (submitting proof of claim). Although the proof of claim to the bankruptcy court included additional billings by a FairPoint competitive LEC, ExOp of Missouri, FairPoint does not seek any relief related to those CLEC billings in this petition, but only a BPR adjustment for its ILEC billings.

¹⁷ *TDS Waiver Order*, ¶16.

¹⁸ 47 C.F.R. §1.3. See also *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

¹⁹ *WAIT Radio*, 418 F.2d at 1159; *Northeast Cellular*, 897 F.2d at 1166.

terminated for Halo.²⁰ FairPoint's failure to recover the revenues in question is due to circumstances beyond the company's control, including Halo's non-compliance with FCC rules and policies.

Granting the petition would allow the BPR's for the four requesting ILECs to more accurately reflect actual intrastate access service provided (and costs incurred) in FY 2011, terminating calls from Halo bound for FairPoint customers.²¹ The BPR was determined in 2012 to form the basis of ROR ILEC access recovery throughout the duration of the transition.²² Waiver is appropriate because the Commission intended carriers to include in their BPRs all intrastate access revenues that were collected or would have been collected in FY 2011 or reasonably soon thereafter. Without the requested relief, FairPoint's four affected ILECs will be unable to reflect the Halo revenues because they have been uncollectable, frustrating the Commission's goal of an accurate revenue count for FY 2011. Locking FairPoint's four affected ILECs into a lower BPR for the duration of the ICC transition would unnecessarily frustrate Commission policy and work a hardship on FairPoint. As the Commission has recognized, "accurate BPR calculations are critical to the successful operation of the

²⁰ FairPoint believes that it satisfies all of the conditions enumerated by the Commission in granting similar relief to other carriers. *TDS Waiver Order*, ¶23. See Skrivan Declaration, ¶¶3-4, ¶¶6-8.

²¹ See *TDS Waiver Order*, ¶22.

²² See *TDS Waiver Order*, ¶7. Although the Commission did permit carriers to seek adjustment for revenues billed in FY 2011 but recovered after the March 2012 cut-off, the adjustment sought in the instant petition is for revenues that have not been recovered. See *id.*, ¶16.

recovery mechanism” and “any inaccuracies in the BPR calculation would carry forward in future recovery mechanism payments.”²³

Moreover, strict enforcement of the rule would compound the wrongdoing done by Halo in engaging in “self-help” and refusing to pay the properly billed charges for services Halo received from FairPoint. FairPoint does not here seek to recover those billings, only to adjust its BPR to render it more accurate. The Commission has found that such adjustments serve the public interest.²⁴

CONCLUSION

For the foregoing reasons, the Commission should grant FairPoint the limited relief requested herein and permit FairPoint to include in its BPR calculations \$124,531.06 in revenues associated with intrastate access traffic terminated to Halo during Fiscal Year 2011. Prompt action on this petition is requested.

Respectfully submitted,



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²³ *Id.*

²⁴ *Id.*, ¶17.

PETITION OF FAIRPOINT COMMUNICATIONS, INC.
FOR LIMITED WAIVER OF THE FCC'S RULES

ATTACHMENT A

DECLARATION OF MICHAEL T. SKRIVAN

I, Michael T. Skrivan, am Vice President, Regulatory, of FairPoint Communications, Inc., in which capacity I am responsible for state and federal regulatory policy, state and federal tariffs, regulatory cost studies, and state and federal regulatory compliance. I have read the attached Petition of FairPoint Communications, Inc. for Limited Waiver of Section 51.317(b)(7) of the FCC's rules (the "Petition"), and I submit this declaration in support of the Petition.

1. During Fiscal Year 2011 (between October 1, 2010 and September 30, 2011) four FairPoint ILEC subsidiaries (and one CLEC) terminated intrastate interexchange (access) traffic from Halo Wireless ("Halo") for which FairPoint billed Halo a total of \$124,531.06 in intrastate access charges under the applicable FairPoint state tariffs. All of FairPoint's bills for the traffic in question were issued in FY 2011. FairPoint seeks to add this amount to its Base Period Revenue ("BPR") because the traffic was terminated and the billings were incurred in FY 2011 – they simply could not be recovered due to Halo's intransigence and subsequent bankruptcy.

2. The FairPoint billings associated with this intrastate access traffic break down as follows:


| ILEC Name | SAC | Usage Dates | Amount Billed |
|-----------------------|------------|--------------------|----------------------|
| Chouteau Tel (Okla) | 431981 | 7/1/11, 8/1/11 | \$24,419.77 |
| FairPoint of Missouri | 421472 | 11/4/10 – 6/3/11 | \$24,412.79 |
| GTC, Inc. (Florida) | 210339 | 12/19/10 – 4/18/11 | \$7,412.09 |
| Orwell Tel (Ohio) | 300649 | 10/18/10 – 8/17/11 | \$68,286.41 |
| TOTAL | | | \$124,531.06 |

3. FairPoint terminated all of the intrastate traffic sent to FairPoint ILECs by Halo for termination during FY 2011. FairPoint timely billed Halo for this traffic within FY 2011.
4. To date, Halo has not paid FairPoint for any of this traffic, despite the fact that the FCC and the states have ruled that this traffic is properly subject to access charges and Halo is liable for compensating FairPoint for this traffic.
5. When FairPoint attempted to collect from Halo, Halo asserted that the traffic was CMRS-originated, and the traffic was intra-MTA and not subject to access charges. However, none of this traffic originated on a CMRS carrier's network – it merely passed over the Halo wireless network after having been originated on a wireline LEC network in a different exchange area. Therefore, intrastate access charges properly were assessed.
6. Halo also asserted that it is protected from the claims of its creditors under Chapter 11 (and later Chapter 7) of the U.S. bankruptcy code. FairPoint submitted these billings to the bankruptcy court shortly after they became overdue, but FairPoint has not received any payment for the charges incurred by Halo. The total amount submitted to the court included CLEC access charges as well as ILEC access charges. The amounts noted above, and for which waiver is sought in the Petition, do not exceed the ILEC intrastate access portion of the charges for which FairPoint seeks compensation through its claim in bankruptcy proceedings.

7. FairPoint has been unable to seek compensation or damages from Halo before state agencies or the civil courts because Halo invoked the protection of the U.S. bankruptcy court at about the same time that Halo became delinquent in paying FairPoint's access charges. Although Halo's liability for compensation for this type of intrastate access traffic has been the subject of earlier state regulatory agency findings in a number of states, any state finding of liability at this point would likely be unenforceable because of the winding down of Halo's affairs in a Chapter 7 liquidation proceeding. Nevertheless, under ample FCC and state precedent, it is reasonable to conclude that FairPoint *would have* secured state regulatory commission findings of liability for this traffic *but for* Halo's invocation of the protection of the bankruptcy laws.
8. The amount of BPR adjustment sought in the Petition represents only intrastate access charges incurred by Halo during FY 2011, and does not include any late payment fees, interest, collection fees, or attorneys' fees.

The foregoing is a true and complete declaration concerning the subject matter hereof, to the best of my information, knowledge and belief.

Dated: March 17, 2015


Michael T. Skriyan

PETITION OF FAIRPOINT COMMUNICATIONS, INC.
FOR LIMITED WAIVER OF THE FCC'S RULES

ATTACHMENT B

PROOF OF CLAIM OF FAIRPOINT COMMUNICATIONS, INC.

U.S. BANKRUPTCY COURT, EASTERN DISTRICT OF TEXAS

HALO WIRELESS, INC., DEBTOR
CASE NO. 11-42464

(FILED NOVEMBER 7, 2011)